IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.871 OF 2005
IN
NOTICE OF MOTION NO.120 OF 2005
IN
PETITION NO.561 OF 2005

Petition for Probate of the Last Will & Testament of William Gerald Days ...Deceased

Mrs.Yasmeen Fakir Mohd. Shaikh ....Appellant
Ori.Respdt.
V/s.
Anib D'Monte & Ors. ....Respondents
Ori.Respdt.No.1
Ori.Petitioner

Mr.M.C. Hegde for the Appellant.

Mr.D.H. Mehta for Respondent No.1.

**CORAM : DR.S. RADHAKRISHNAN & S.J. VAZIFDAR, JJ.**
**DATED : 2ND MAY, 2006.**

**ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :**

1. This is an Appeal against an ad-interim order passed by the learned single Judge restraining the Appellant/Repondent No.11 from executing a decree dated 30.4.1997 passed by the Bombay City Civil Court in S.C. Suit No.955 of 1982 even though the decree was confirmed by this Court and by the Supreme Court.

2. The facts of this case compel us to interfere

with an ad-interim order. The only ground on which the order has been passed is the pendency of the above Petition for probate of a Will. There is no discussion in the impugned order whatsoever on merits. The Respondent has not only committed contempt of an order of this Court but also violated an undertaking given to the Supreme Court to vacate the premises in respect whereof he has not a semblance of a right and has been declared to be a trespasser. The Appellant is the owner of the premises.

3. It is not necessary to set out the facts involved in the proceedings we will now refer to. It is sufficient to note the orders therein.

(a). By a decree dated 30.4.1997 passed in S.C. Suit No.955 of 1982, the Bombay City Civil Court declared Respondent No.1 to be trespasser, directed Respondent No.1 to hand over to the Appellant the suit premises and restrained Respondent No.1 permanently from disturbing or interfering with the Appellant's access to and use of the premises. The first Respondent's defence of tenancy was rejected.

(b). Respondent No.1 filed a First Appeal against the said order. The First Appeal was initially

dismissed for default, but was subsequently restored. Thereafter the First Appeal No.697 of 1997 was dismissed on merits by an order and judgment of a learned single Judge dated 8.4.2005. The learned Judge held that Respondent No.1 had miserably failed to prove that he was regarded as a foster son of the deceased through whom he claimed a right in the said property. The first Respondent's case of tenancy was again rejected. Respondent No.1 relied upon the Will which we shall deal with shortly. Suffice it to state at this stage that the learned single Judge did not permit Respondent No.1 to rely upon the will. as Respondent No.1 had not obtained Probate or Letters of Administration in respect thereof. Apart from the legal effect thereof, the learned Judge held that the first Respondents failure to even attempt to obtain probate created a doubt as to the veracity and validity of the will. In fairness to Respondent No.1, the learned Judge however observed that the findings regarding the will ought not to be considered as final and clarified that so far as the case before him was concerned, the will did not support the first Respondent's case.

. The learned single Judge held that Respondent No.1 had miserably failed to prove any right in the

property and declared him to be a trespasser. The judgement of the City Civil Court was confirmed. Respondent No.1's Appeal was dismissed with costs throughout and he was directed to hand over possession of the said premises within three weeks.

(c). Against the above order and judgment dated 8.4.2005, Respondent No.1 filed a Special Leave Petition. The same was dismissed by the following order dated 6.5.2005 :-

> "We find no merit in the Special Leave Petition and the same is accordingly, dismissed.
>
> However, with the consent of the counsel for the respondent, the petitioner is granted three months time to vacate the premises subject to his furnishing usual undertaking within four weeks."

. To sum up therefore at this stage, Respondent No.1 had failed entirely to establish any semblance of a right in the said premises.

4. It is important to note that if Respondent No.1 had furnished an undertaking to the Supreme court as recorded in the order dated 6.5.2005 he would have been bound to vacate the premises within three months i.e. by 6.8.2005. Mr.Mehta stated that Respondent

No.1 had not furnished the undertaking and therefore the order of the Supreme Court is of no value. A bold suggestion. Even assuming that he is right, which he most certainly is not, Respondent No.1 was in that event bound by the order dated 8.4.2005 to vacate by 29.4.2005.

5. The present proceedings are an attempt to avoid compliance of the order of this Court dated 8.4.2005 and of the Supreme Court dated 6.5.2005.

6. Respondent No.1 has to this end gone to the extent of contending in his affidavit in support as follows :-

> "I say that the issue with regard to the tenancy rights has been erroneously incidentally decided by the City Civil Court, and as such the judgment and order passed by the City Civil Court and confirmed upto the Hon'ble Supreme Court would not operate as Res Judicata either in the proceedings pending in the Small Causes Court at Bombay or in these proceedings."

7. Instead of complying with the above orders, on 18.7.2005, Respondent No.1 filed the above Petition for Probate of the alleged last will and testament of

the deceased dated 11.11.1973. The above Notice of Motion was taken out in the above Petition on 1.8.2005. As noted in the impugned order, Respondent No.1 did not make any application for ad-interim

reliefs. The application was moved on 2.9.2005 only after the Bailiff visited the premises on 31.8.2005 to execute the decree. By this time Respondent No.1 was liable to hand over possession. Respondent No.1 had failed and neglected to do so.

8. Respondent No.1 had filed an R.A. Declaration Suit No.408 of 1999 in the Court of Small Causes at Mumbai for a declaration that he is a tenant. An interim application made by way of Interim Notice No.1203 of 1999 was dismissed by an order dated 15.4.2002 by the Court of Small Causes.

9. Having failed in every proceedings adopted by him, Respondent No.1 filed the above Petition for probate 33 years after the alleged will was made. Clause 5 of the alleged Will relied upon by Respondent No.1 reads as under :-

> "5. I hereby given devise and bequeath all my belongings presently owned by me or all other property or properties which may come to me

> hereafter from any source or from my wife or other that I may be entitled to or possessed or at the time of my death UNTO my nephew ANIB ANTHONY D'MONTE whom I have brought up like a son and who is residing with us since his childhood."

10. It is contended that the deceased was allegedly the tenant of the premises and that Respondent No.1 has inherited the tenancy under the will.

11. Firstly, the judgment dated 8.4.2005 confirmed by the order of the Supreme Court dated 6.5.2005, has expressly held that Respondent No.1 is not the foster son of the deceased. Secondly, Mr.Mehta, the learned counsel appearing on behalf of Respondent No.1 admits that as far as this Court is concerned, it is settled law that a tenancy cannot be bequeathed. He however, submits that he would like to challenge the judgement of this Court in the Supreme Court. However, he conceded that as far as this Court is concerned, we are bound by the judgment of a Division Bench of this Court.

12. The learned single Judge, with great respect, has not considered any of these facts. The learned single Judge has granted the ad-interim order only on

the basis that the above proceedings have been filed. We are, with great respect, unable to endorse the approach adopted by the learned single Judge in granting the ad-interim order.

13. Mr.Mehta submitted that the Appeal is not maintainable as the impugned order was passed under Section 192 of the Indian Succession Act. We are unable to agree.

14. Firstly the impugned order in effect deprives the first Respondent of the benefit of a decree passed by this Court and endorsed by the Supreme Court. It is difficult in that circumstance to say that the impugned order does not determine the rights of the Appellant. In any event, the order does not appear to have been passed under Section 192 of the Indian Succession Act. On the face of it, the impugned order does not disclose the same. Indeed none of the ingredients of Section 192 of the Indian Succession Act are even referred to by the learned single Judge. Further none of the ingredients of Section 192 of the Indian Succession Act are satisfied. In the circumstances, the impugned order was not one under Chapter VII of the Indian Succession Act.

15. In the circumstances, the Appeal is allowed. Respondent No.1 shall pay the costs of this Appeal fixed at Rs.10,000/- within twelve weeks from today. The order is stayed for a period of eight weeks to enable Respondent No.1 to challenge this order.

16. The impugned order was passed in an ad-interim application. The learned Judge however allowed the Notice of Motion itself. It is clarified therefore that this order shall operate as a rejection of ad-interim reliefs and the Notice of Motion shall be heard finally.

(DR.S. RADHAKRISHNAN, J.)

(S.J. VAZIFDAR, J.)

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**DATE OF DECISION : 2ND MAY, 2006**

For Approval and Signature :

**HON'BLE MR.JUSTICE DR.S. RADHAKRISHNA**

**HON'BLE MR.JUSTICE S.J. VAZIFDAR**

1. Whether Reporters of Local Papers may be allowed to see the judgement ? )

2. To be referred to the Reporter or not ? )